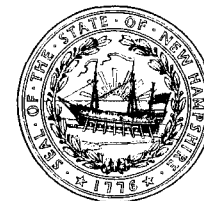




The State of New Hampshire
Department of Environmental Services



Michael P. Nolin
Commissioner

City of Rochester
Attn: Mr. John Scruton, City Manager
Rochester City Hall
31 Wakefield Street
Rochester, NH 03867

Re: Sanitary Sewer Overflow Reporting
Requirements
NPDES Permit No. NH0100668

**NOTICE OF PROPOSED
ADMINISTRATIVE FINE
No. AF 06-045**

September 15, 2006

I. INTRODUCTION

This Notice of Proposed Administrative Fine is issued by the Department of Environmental Services, Water Division to the City of Rochester, pursuant to RSA 485-A:13, 485-A:22 and NH Admin. Rule Env-C 603. The Division is proposing that fines totaling \$4,000 be imposed against the City of Rochester for the violations alleged below. **This notice contains important procedural information. Please read the entire notice carefully.**

II. PARTIES

1. The Department of Environmental Services, Water Division ("DES"), is a duly-constituted administrative agency of the State of New Hampshire, having its principal office at 29 Hazen Drive, Concord, New Hampshire.
2. The City of Rochester ("Rochester") is a duly-constituted municipality of the State of New Hampshire, the City Hall of which has a mailing address of 31 Wakefield Street, Rochester, New Hampshire 03867.

III. SUMMARY OF FACTS AND LAW SUPPORTING CLAIMS

1. Pursuant to RSA 485-A:13 and related sections, DES regulates the discharge of pollutants to surface waters under a permit system. As part of this program, the Commissioner of DES has adopted Env-Ws 401-405 relating to permits and has adopted Env-Ws 1700 to establish water quality standards for the state's waters.
2. Pursuant to RSA 485-A:22, V, the Commissioner is authorized to impose fines of up to \$2,000 per violation for violations relating to this program. Pursuant to this section, the Commissioner has adopted Env-C 603 to establish the schedule of fines for such violations.
3. Rochester owns and operates a wastewater treatment facility located at Maple Street in Rochester, New Hampshire (hereinafter "the WWTF").

4. Operation of the WWTF is permitted under the terms of the federal National Pollutant Discharge Elimination System ("NPDES") permit number NH0100668, issued by the United States Environmental Protection Agency ("USEPA") to Rochester, effective on July 23, 1997. This NPDES permit was adopted as a State discharge permit under RSA 485-A:13, I(a). The federal and state permits are collectively referred to hereinafter as the "NPDES Permit".
5. The NPDES Permit authorizes Rochester to discharge treated wastewater from the WWTF to the Cocheco River only through a designated outfall, subject to specified effluent limitations, monitoring requirements, and other conditions.
6. NPDES Permit Part II, Section D.1.e., requires that Rochester report any noncompliance which may endanger health or the environment.
7. Correspondence from Thomas H. Willis, Jr., P.E., Rochester City Engineer/Technical Services Manager, to the Division, dated March 20, 2006, provided notice of a significant discharge of raw sewage from a drainage outfall pipe located near the intersection of Front Street and Cocheco Avenue.
8. The Division requested more information about the event from Rochester via phone calls to Thomas H. Willis, Jr. and subsequent correspondence to Melodie Esterberg, P.E., Rochester Commissioner of Public Works, dated June 2, 2006, and June 28, 2006, via certified mail. The Division did not receive any response from Rochester to these requests for more information.
9. DES issued Administrative Order No. WD 06-037 on August 9, 2006 (the "Order") to Rochester for violating their NPDES permit and RSA 485-A by not providing complete information regarding the unpermitted discharge event, as requested.
10. The Order required that Rochester submit nine (9) specific items of information regarding the unpermitted discharge within 10 days of the date of the Order. The deadline for compliance with the Order was August 19, 2006. The response from Rochester was received by the Division on September 6, 2006.

IV. VIOLATIONS ALLEGED AND PROPOSED ADMINISTRATIVE FINE

1. Rochester has violated RSA 485-A:22 by failing to comply with Administrative Order No. WD 06-037 dated August 9, 2006. For this violation, Env-C 603.08(a) specifies a fine of \$2,000 per calendar month, or part thereof that compliance is not achieved after the deadline specified in the order for each provision of the order not complied with. Based on the duration of the violation, the Division is seeking a fine of \$4,000.

The total fine being sought is \$4,000.

V. REQUIRED RESPONSE, OPPORTUNITY FOR HEARING

Pursuant to Env-C 601.06, Rochester is required to respond to this notice. Please respond no later than October 20, 2006 using the enclosed colored form.

1. If Rochester would like to have a hearing, please have an authorized representative sign the appearance section of the colored form (upper portion), check the appropriate line requesting a **formal hearing** and return it to the DES Legal Unit, at the address noted on the form.
2. If Rochester wishes to discuss the possibility of settling the case, please have an authorized representative sign the appearance form, check the appropriate line indicating a desire to **meet informally** and return it to the DES Legal Unit.
3. If Rochester chooses to waive the hearing and pay the proposed fine, please have an authorized representative sign the waiver (lower portion) and return it **with payment of the fine** to the DES Legal Unit.

Rochester is not required to be represented by an attorney. If Rochester chooses to be represented by an attorney, the attorney must file an appearance and comply with NH Admin. Rule Env-C 200.

VI. DETERMINATION OF LIABILITY FOR ADMINISTRATIVE FINES

Pursuant to Env-C 601.09, in order for any fine to be imposed after a hearing, the Division must prove, by a preponderance of the evidence, that the Respondent committed the violations alleged and that the total amount of fines sought is the appropriate amount under the applicable statute and rules. Proving something by a preponderance of the evidence means that it is **more likely than not** that the thing sought to be proved is true.

If the Division proves that the Respondent committed the violations and that the total amount of fines sought is the appropriate amount under the applicable statute and rules, then the fine sought will be imposed, subject to the following:

* Pursuant to Env-C 601.09(c), the fine will be **reduced by 10%** for each of the circumstances listed below **that Respondent proves, by a preponderance of the evidence**, applies in this case:

1. The violation was a one-time or non-continuing violation, **and** the Respondent did not know about the requirement when the violation occurred, **and** the violation has not continued or reoccurred as of the time of the hearing, **and** any environmental harm or threat of harm has been corrected, **and** the Respondent did not benefit financially, whether directly or indirectly, from the violation.
2. At the time the violation was committed, Respondent was making a good faith effort to

comply with the requirement that was violated.

3. Respondent has no history of non-compliance with the statutes or rules implemented by DES or with any permit issued by DES or contract entered into with DES.
4. Other information exists which is favorable to the Respondent's case which was not known to the Division at the time the fine was proposed.

**** Pursuant to Env-C 601.09(d) and (e), the fine shall be increased by 10% for each of six (6) possible aggravating circumstances listed therein that the Division proves, by a preponderance of the evidence, apply in this case; up to the maximum fine stated in the statute under which the Division is seeking the fine.**

*******IMPORTANT NOTICE*******

An administrative fine hearing is a formal hearing. All hearings will be recorded, and all witnesses will testify under oath or affirmation. At the hearing, the Division will present testimony and evidence to try to prove that Rochester committed the violation(s) alleged above and that the fine(s) should be imposed. **The hearing is Respondent's opportunity to present testimony and evidence that Respondent did not commit the violation(s) and/or that the fine(s) should not be imposed, or that the fine(s) sought should be reduced.** If Respondent has any evidence, such as photographs, business records or other documents, that Respondent believes show that Respondent did not commit the violation(s) or that otherwise support Respondent's position, the Respondent should bring the evidence to the hearing. Respondent may also bring witnesses (other people) to the hearing to testify on Respondent's behalf.

Information regarding this proposed fine may be made available to the public via the DES Web page (www.des.nh.gov). If the City of Rochester has any questions about this matter, please contact the DES Legal Unit, at (603) 271-7509.

COPY

Harry T. Stewart, P.E., Director
Water Division

Enclosure (NHDES Fact Sheet #CO-2002)

cc: Michael J. Walls, DES Assistant Commissioner
Jennifer J. Patterson, Sr. Asst. Attorney General, NHDOJ/EPB
Public Information Officer, DES PIP Office

cc: Gretchen Hamel, Administrator, Legal Unit
Melodie Esterberg, Rochester, Director, Department of Public Works
Thomas H. Willis, Jr., Rochester, City Engineer/Technical Services Manager

***** RETURN THIS PAGE ONLY *****

**THE CITY OF ROCHESTER IS REQUIRED BY LAW
TO RESPOND TO THIS NOTICE.**

PLEASE RESPOND NO LATER THAN OCTOBER 20, 2006

Please check the appropriate line and fill in the requested information below.

APPEARANCE On behalf of the City of Rochester:

_____ I request to have a **formal hearing** scheduled in this matter.

_____ I would like to **meet informally** to discuss the issues in this matter.

WAIVER OF HEARING On behalf of the City of Rochester:

_____ I certify that I understand the right to a hearing regarding the imposition of the proposed administrative fine and that I hereby waive those rights. The fine payment in the amount of \$4,000 paid to "Treasurer, State of New Hampshire" is enclosed.*

** If payment is made by a check, draft, or money order that is returned due to insufficient funds, pursuant to NH RSA 6:11-a, DES may charge a fee in the amount of 5% of the face amount of the original check draft, or money order or \$25.00, whichever is greater, plus all protest and bank fees, in addition to collecting the amount of the original check draft, or money order.*

Pursuant to Env-C 203.05 please provide the following information:

Signature

Date

Name (please print or type): _____

Title: _____

Phone: _____

RETURN THIS PAGE ONLY AND ANY PAYMENT TO:

DES Legal Unit

Attn: Michael Sclafani, Legal Assistant

P.O. Box 95

Concord, NH 03302-0095

ENVIRONMENTAL Fact Sheet



29 Hazen Drive, Concord, New Hampshire 03301 • (603) 271-3503 • www.des.nh.gov

CO-2

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Administrative Fines of the Department of Environmental Services

The Commissioner of the Department of Environmental Services (DES) is authorized by several statutes to impose administrative fines for certain violations of those statutes. In order to implement this authority, the Commissioner has adopted rules which specify the procedures for notifying people that a fine is being proposed and which specify the fine amount for any given violation. These rules are identified as Chapter Env-C 600.

Administrative fine proceedings follow a defined path. The first step is for a Division of DES to issue a Notice of Proposed Fine. The Notice will inform you of the violations the Division believes you have committed, together with the dollar amount of the fine that is being proposed. At this point, a final decision as to whether to impose the fine **has not been made** ... the Notice simply initiates the proceeding. The Notice will also inform you that you have a right to have a hearing before a final decision will be made, and may give a date and time for the hearing.

The Notice you receive will have a page attached to it on which you can indicate whether you will attend a hearing or whether you are waiving your right to a hearing and paying the fine which has been proposed. **YOU MUST COMPLETE AND RETURN THIS FORM.** The worst thing you can do if you receive a Notice is to ignore it! Under the rules which have been adopted, the case can proceed even if you don't respond. In order to achieve the best result, you must participate in the process.

When you receive a Notice of Proposed Fine, if you are interested in trying to settle the case without going to a formal hearing you should contact the person identified in the Notice. Many fine cases are settled in this way, often with a lower fine, a payment schedule, and/or a suspended fine. The negotiations need to start soon after the Notice is received, though. Don't wait until the day scheduled for the hearing to ask about settling the case.

If the case proceeds to a hearing, the Commissioner will designate a person to serve as a hearing officer to preside at the formal hearing. The hearing officer will not have prior knowledge of the Division's allegations, and will be neutral insofar as the outcome of the case is concerned. At the hearing, the Division will be required to prove that the violation(s) occurred and that the proposed fine is warranted. You will have an opportunity to ask questions of (cross-examine) the Division staff, and also present your own evidence, including testimony of witnesses if you wish, to show why the fine should not be imposed.

(over)

After the hearing is over, the hearing officer will compile the record (i.e. all of the information that was received at the hearing) and will make a recommendation to the Commissioner as to whether or not the fine should be imposed. The Commissioner will make a decision based on the evidence and testimony, and the decision issued by the Commissioner will specifically state the reasons for the decision.

The rules adopted by the Commissioner require the proposed fine to be reduced in certain circumstances, which are listed at Env-C 601.09. These include that you have not previously violated a law or rule implemented by DES, or that you acted in good faith. The Commissioner also has the discretion to allow you to pay a fine on a payment schedule, and/or to suspend all or a portion of the fine conditional upon remedying the underlying violation or staying in compliance with DES requirements for a specified period of time.

Sometimes people are concerned that the findings and rulings made by the Commissioner might be used against them in a separate proceeding (for instance, if their neighbor sues them for damages arising out of the same violation(s) for which they are being fined). In such a case, DES has accepted payment of the fine with a specific denial of liability. This is like pleading "no contest" to a traffic ticket: you pay the fine assessed, but are not admitting that you did anything wrong.

This fact sheet is intended as a basic source of information concerning DES administrative fines. It is not intended to replace the laws and rules regarding administrative fines, but merely to provide a summary of them.

For more information contact the DES Legal Unit, PO Box 95, Concord, NH 03302-0095, (603) 271-6072.